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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re R.C., a Person Coming  
Under the Juvenile Court Law.

B289484  
(Los Angeles County  
Super. Ct. No.  
17CCJP01130A)

LOS ANGELES COUNTY  
DEPARTMENT OF  
CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

S.C. et al.,

Defendants and Respondents.

APPEAL from an order of the Superior Court of Los  
Angeles County, Michael E. Whitaker, Judge. Reversed.

Patricia Bell, under appointment by the Court of Appeal,  
for Appellant R.C.

Mary C. Wickham, County Counsel, Kristine P. Miles,  
Acting Assistant County Counsel, Jeanette Cauble, Principal  
Deputy County Counsel, for Plaintiff and Appellant Los Angeles  
County Department of Children and Family Services.

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## **I. INTRODUCTION**

Minor R.C. and the Los Angeles County Department of Children and Family Services (Department) appeal from the juvenile court's order dismissing a first amended Welfare and Institutions Code section 300<sup>1</sup> petition. On appeal, R.C. contends that the juvenile court erred in failing to apply the correct standard in assessing substantial risk under subdivision (j) of section 300 and in failing to apply the "tender years" doctrine and substantial evidence did not support dismissal of the petition. The Department also contends the dismissal was not supported by substantial evidence and joins R.C.'s other arguments. We reverse.

## **II. BACKGROUND**

At the end of August 2017, R.C. was born prematurely and admitted to the neonatal intensive care unit at Centinela Hospital. R.C. had a negative toxicology screen. In early September 2017, the Department received an expedited referral alleging mother's general neglect.

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<sup>1</sup> All statutory citations are to the Welfare and Institutions Code unless otherwise noted.

A social worker responded to the hospital and spoke with the nurse in charge of R.C.'s care. The nurse stated she had seen mother the previous week when mother came to visit R.C. Mother had a strong smell of marijuana and cigarettes. The nurse had seen mother only a few times. Mother was informed that she needed to bring a car seat to the hospital to complete R.C.'s assessment, but mother did not comply. The hospital social worker made several unsuccessful attempts to contact mother about the car seat.

The nurse reported that R.C. had received some, but not all, of her immunizations. Before her immunizations could be completed, R.C. needed to gain weight—she was then under five pounds. Whomever R.C. was placed with needed to feed R.C. a specialized formula to help her gain weight. R.C. was released to the social worker.

Maternal aunt Jeanette H. told the social worker that “they” had attempted, unsuccessfully, to call mother to pick up R.C. Jeanette H. reported that mother “had been on the streets prostituting and doing drugs.” Mother did not have a stable residence and was living with a man she had met four months earlier.

Maternal aunt Joan H. told the social worker that mother, then age 21, had her first child at age 15 and a second child before giving birth to R.C. Family members adopted both of mother's two other children.<sup>2</sup>

Joan H. was willing to care for R.C. She and the family would ensure that R.C. was well cared for and safe and would be

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<sup>2</sup> A subsequent Department report stated that the family cared for one of mother's children through a probate guardianship.

supportive and help mother reunify with R.C. Joan H. stated she had witnessed positive changes in mother during her pregnancy with R.C. In the latter part of the pregnancy, mother had stopped prostituting and using drugs.

On September 6, 2017, the social worker spoke with mother on the telephone. Mother said she was confused about what was going on and that she had been told the hospital would not discharge R.C. until R.C. gained more weight. Informed of statements concerning her drug use, mother admitted she used marijuana. The social worker asked mother if she was willing to take a drug test. Mother agreed.

After mother's drug test,<sup>3</sup> the social worker picked up mother. Mother stated when that she was 18 years old, she was "allowed" to meet her biological mother and that was when her life went downhill. "Mother reported that she was informed by her mother that she was sold for drugs, and that her mother allowed men to rape her." She further reported that she was abused while in foster care.

Mother said she had made bad decisions and lost two of her children. She missed out on enjoying her teenage years because she had to care for her daughter. She was constantly tired and "could no longer do it," so she allowed her sister to adopt her daughter. Mother then had another child whom she also allowed to be adopted.

When the social worker and mother arrived at the motel where mother was staying and entered mother's room, the social worker immediately smelled marijuana and smoke. The social worker found it difficult to breathe and informed mother that because R.C. had been born prematurely, the air quality was not

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<sup>3</sup> The drug test was positive for cannabinoids.

healthy for her. Mother said that she understood and had smoked marijuana and cigarettes outside after R.C. was born.

Mother said that during her pregnancy she had not used drugs or alcohol or smoked out of concern for R.C. Mother stated that she had not visited R.C. more often because she was recovering from a cesarean section. She had not picked up R.C. from the hospital because she believed R.C. would be there for a longer period of time.

Mother wanted to keep R.C. She said she met her boyfriend when she was five months pregnant. He told her that she could no longer be a prostitute if she wanted to stay with him. Mother's boyfriend "accept[ed]" R.C. and was working to provide for mother and R.C. Mother and he were saving money for an apartment. Mother was looking for work to help with expenses.

The following day, the social worker informed mother that a case would be opened. Mother said she would agree to R.C.'s placement in Joan H.'s home until mother completed services and was stable enough to care for R.C. The social worker noted that mother had not requested to see R.C. after she had been placed with Joan H. The social worker offered to facilitate a visit with R.C., but mother stated she would make the arrangements.

Mother's prior child welfare history included a 2014 referral alleging general neglect of her daughter N.C. Mother tested positive for marijuana when N.C. was born. Mother had received limited prenatal care and admitted smoking marijuana daily during her pregnancy. She said she did not know smoking marijuana during her pregnancy could harm her unborn child and seemed unconcerned when so informed. A case was opened

concerning mother's marijuana abuse during her pregnancy with N.C. and her parental rights ultimately were terminated.

On October 10, 2017, the Department completed a child and family team meeting to determine what mother's goals were for the family and what services she was willing to complete. Mother stated that she wanted to reunify with R.C. and "she was going to do whatever she had to, to get her baby back. Mother reported that she was willing to complete counseling, get a job, find a stable place to live, and go back to school to give her baby a better future."

On October 13, 2017, the Department detained R.C. from mother's custody. On October 17, 2017, it filed a section 300 petition. The section 300 petition alleged, under subdivisions (b)(1) and (j), that R.C. was at risk of harm because mother had a history of substance abuse and was a current abuser of marijuana; mother had a positive toxicology screen for marijuana on September 6, 2017; mother's substance abuse interfered with providing regular care and supervision of R.C. who was of a young age; and R.C.'s sibling, N.C., was a prior dependent of the juvenile court and had received permanent placement services due to mother's substance abuse.

On October 18, 2017, the juvenile court ordered R.C. detained. It found Christopher T., mother's boyfriend, to be R.C.'s presumed father.<sup>4</sup> The juvenile court ordered the Department to provide family reunification services to the parents and R.C. Mother and father were granted visitation and were ordered to participate in weekly drug testing.

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<sup>4</sup> Mother claimed that R.C.'s biological father was David L. She did not know of David L.'s whereabouts.

In its Jurisdiction/Disposition Report, filed February 8, 2018, the Department reported that father had two other children, Z.T. and D.T., who were declared dependents of the juvenile court due to father's domestic violence. Father's reunification services had been terminated as to both children.

On January 13, 2018, a dependency investigator interviewed mother. Mother reported that she started using marijuana at age 13 and did not use any other drugs. She reported "[w]e get" an "eighth" a day, which could be rolled into five to eight "blunts." Mother explained that she kept her marijuana in a drawer, but that she would store it elsewhere or hide it if R.C. was present. Also, she would store her bong and the gas mask she and father used to smoke marijuana away from R.C. If R.C. was with mother, mother would not smoke marijuana until R.C. was asleep. Mother stated that she and father would smoke marijuana outside, and not in R.C.'s presence. She claimed, "If it came down to it and I was told that it was a choice between weed and [R.C.], it would be [R.C.] every time." Mother did not have a medical marijuana card but claimed the drug helped control her anger.

Mother denied smoking marijuana while she was pregnant with R.C. and stated that she was "clean at her birth." She acknowledged she "did go up to the hospital smelling like weed." Mother did not believe that her continued use of marijuana would prevent her from caring for or adequately supervising R.C. She noted that her marijuana use had not prevented her from babysitting a two-year-old child. She stated that she did not smoke around or while caring for children.

The investigator also spoke with father. Father affirmed mother's claim that she did not smoke while she was pregnant

with R.C. He also affirmed that he and mother smoked marijuana every day, smoking five to eight “blunts.” Father did not believe that his or mother’s marijuana use would prevent them from adequately caring for a child. He and mother smoked marijuana outside. If R.C. was placed with father and mother, they would take turns smoking marijuana or not smoke at all.

Between December 6, 2017, and January 16, 2018, mother had seven “No Show/Positive” drug tests. After testing positive for cannabinoids on December 6, 2017, mother was a “no show” for the remaining tests. Mother and father had lengthy criminal histories.

On October 10, 2017, and December 5, 2017, mother and father visited R.C. On December 26, 2017, the dependency investigator provided mother with contact information for her social worker and advised mother to contact the social worker to arrange for regular visitation with R.C. As of January 13, 2018, mother had not contacted the social worker, claiming she had a new cell phone and had lost the contact information.

On January 13, 2018, mother and father stated they had not enrolled in any programs or services to address the issues that brought them to the Department’s attention. Mother said they could not afford to pay for them and the cost would cause them to become homeless eventually.

On March 15, 2018, the Department filed a first amended section 300 petition. The amended petition added allegations that father had a history of substance abuse and was currently abusing marijuana; R.C. required constant care and supervision due to her young age; R.C.’s half-sibling, D.T., was a current dependent of the juvenile court and receiving permanent placement services due to father’s substance abuse; and father



failed to participate regularly in court-ordered services that included a 52-week certified domestic violence program, a full drug and alcohol program with aftercare, a 12-step program, random drug and alcohol testing, parenting classes, and individual counseling to address case issues.

In an April 10, 2018, supplemental report for the jurisdiction/disposition hearing, the Department informed the juvenile court that father tested positive for marijuana on December 5, 2017, and failed to show for 14 subsequent drug tests. Mother had provided the social worker with a document showing she had enrolled in an online parenting course. The social worker informed mother that the online course did not meet Department criteria. Neither mother nor father had provided proof that either was enrolled in any other services.

At the jurisdiction/disposition hearing, mother admitted she used marijuana daily. She estimated that she used about “\$25 worth, about an eighth. So somewhere between three to six, maybe eight blunts.” Mother explained that a “blunt” was a cigar from which the tobacco had been removed and replaced by marijuana. A “blunt” was about three to four inches long and less than one centimeter in circumference.

Mother used the drug at home and socially when out with friends. She denied using marijuana around her other children, stating that she was not around them often. Asked if she would smoke three to eight “blunts” a day if R.C. was returned to her custody, mother responded, “Yes.” She added, “If necessary, I won’t be smoking at all.”

Mother testified she had been smoking marijuana for eight to nine years. She did not smoke three to eight “blunts” a day by herself, she smoked them with father if he was around or with

friends. Mother stated that she had been smoking heavily only for the last three or four years. Recently, mother smoked less because she was working 35 hours a week babysitting or “doing hair.” In addition to smoking marijuana, she occasionally consumed it as an edible. Mother visited R.C. three times since she was detained. She did not use marijuana before any of the visits.

Mother testified that father generally consumed the same amount of marijuana that she consumed because they smoked together. Recently, father also smoked less because he was employed.

At the conclusion of mother’s testimony, the Department requested that the juvenile court sustain the amended petition. Its attorney noted that mother and father had been ordered to participate in drug programs in the past and both had their services terminated with regard to other children. She argued there was a nexus between mother’s long-term and significant daily marijuana use and a risk of harm to R.C. Counsel noted that the social worker had difficulty breathing in mother’s hotel room due to the level of marijuana smoke. Counsel argued that mother’s claim that she would stop smoking marijuana if R.C. was returned to her was not credible in light of mother’s decision to continue smoking marijuana after R.C. was born.

R.C. joined the Department’s request that the juvenile court sustain the amended petition. Her attorney noted the conflict between mother’s testimony that she would stop smoking marijuana if R.C. was returned to her and her statement to the social worker that she would not smoke marijuana until R.C. was asleep and would smoke outside.

Father's attorney noted father's admission of daily marijuana use, but argued that the Department had not met its burden to show how that use placed R.C. at risk of harm.

Mother's attorney argued that mother's ability to work 35 hours a week while daily smoking marijuana demonstrated that she also could take care of R.C. despite her marijuana use. He stated mother "believes that she is able to use marijuana and still take care of the child and do it in an appropriate way." Counsel argued that marijuana use was legal and the Department had not presented any scientific evidence about the "levels that would put mom in a position where she would be unable to take care of the child."

The Department's attorney responded, in part, that although it had become legal to smoke marijuana, it was also legal to drink alcohol. If a parent was before the juvenile court who was intoxicated on alcohol every day, the juvenile court should find a risk to the child.

Addressing the Department's argument, the juvenile court noted that at least with respect to driving a vehicle, there was a benchmark for measuring alcohol intoxication—a .08 blood alcohol content. It then asked what evidence had been presented that mother's marijuana use caused her to be intoxicated to the point that she could not care for R.C. The Department's attorney responded that there was no evidence of the levels of marijuana in mother because mother had refused to test since September. Counsel again referred to the high level of smoke in mother's hotel room when the social worker visited.

The juvenile court stated that the Department was asking it to speculate about whether mother's and father's marijuana use reached a level of intoxication. Further, it was asking the

juvenile court to decide whether any such level of intoxication posed a risk to R.C. With alcohol, the juvenile court noted, it could use its common sense and life experiences—it could differentiate between the consumption of one can or eight cans of beer. It did not have a similar frame of reference for marijuana. Because the Department did not present such evidence, the juvenile court dismissed the entire petition.

The Department filed a Petition for Extraordinary Writ asking for relief from the juvenile court’s order dismissing jurisdiction. The writ petition was denied in case number B289466.

### III. DISCUSSION

#### *The Juvenile Court Erred in Dismissing the Section 300, Subdivision (j) Count in the Amended Petition*

Under section 300, subdivision (j),<sup>5</sup> a child is within the jurisdiction of the juvenile court if (1) the child’s sibling has been abused or neglected and (2) there is a substantial risk that the

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<sup>5</sup> Subdivision (j) provides that a child is within the jurisdiction of the juvenile court if: “The child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.”

child will be abused or neglected. R.C. and the Department contend that insufficient evidence supports the juvenile court's dismissal of the amended petition under section 300, subdivision (b) and (j). We hold that the evidence compels a finding of jurisdiction under subdivision (j) as a matter of law and, accordingly, that the juvenile court erred in dismissing the subdivision (j) count.<sup>6</sup>

A. *Standard of Review*

“[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a

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<sup>6</sup> In light of our holding, we do not reach R.C. and the Department's alternative claims that the juvenile court erred in failing to apply the correct standard in assessing substantial risk under section 300, subdivision (j) and in failing to apply the tender years doctrine. We also do not decide whether the juvenile court erred in dismissing the subdivision (b) counts. (See *In re I.J.* (2013) 56 Cal.4th 766, 773 [“When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.”].)

finding.’ [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528; *In re Luis H.* (2017) 14 Cal.App.5th 1223, 1226-1227 [applying standard of review to a dependent’s challenge to a juvenile court’s no jurisdiction finding].)

B. *Analysis*

The purpose of the dependency system “is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.” (§ 300.2.) Jurisdiction under section 300, subdivision (j) provides that safety and protection to a child whose sibling has been abused or neglected. (*In re I.J., supra*, 56 Cal.4th at p. 774 [“subdivision (j) was intended to expand the grounds for the exercise of jurisdiction as to children whose sibling has been abused or neglected as defined in section 300, subdivision (a), (b), (d), (e), or (i).’ . . . [Citation.]”].)

In determining substantial risk under subdivision (j), a juvenile court must consider the following factors: “the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.” (*In re I.J., supra*, 56 Cal.4th at p. 774.) Subdivision (j) allows a juvenile court to take into consideration factors that might not be determinative if the court were adjudicating a petition filed directly under one of the other subdivisions. (*Ibid.*)

“The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance.’ [Citation.]” (*In re I.J.*, *supra*, 56 Cal.4th at p. 774.)

The evidence before the juvenile court compels a finding that mother’s marijuana use poses a substantial risk of neglect to R.C. under subdivision (j) of section 300 as a matter of law. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) That evidence showed that three years prior to the commencement of this case, in June 2014, the juvenile court sustained a petition alleging mother’s marijuana use rendered mother incapable of providing care for R.C.’s sibling N.C. In that case, mother admitted to smoking marijuana daily. Informed that her marijuana use while pregnant could have harmed her unborn child, mother appeared “unconcerned, unknowledgeable, and very nonchalant.” Mother’s parental rights to N.C. were terminated and N.C. was later adopted.<sup>7</sup> Mother also lost custody, through a probate proceeding, of S.C., also R.C.’s sibling.

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<sup>7</sup> Father had a similar history with the dependency system. Just three months after the commencement of this case, the juvenile court terminated father’s reunification services to his child D.T. According to the Jurisdiction/Disposition Report, the case concerned father’s domestic violence. The first amended petition states the case also involved father’s history of substance

At the October 18, 2017, detention hearing, the juvenile court ordered the Department to provide mother and father with reunification services. Three months later, in a January 13, 2018, interview with the dependency investigator, mother and father stated that they had not enrolled in any services. Mother explained that the cost was more than they could afford and paying for classes would cause them to become homeless eventually. Yet, at the April 17, 2018, jurisdiction/disposition hearing, mother testified that she smoked marijuana daily, spending about \$25 a day or \$750 a month on marijuana. That is, when given a choice of spending her limited money on services that would help her reunify with R.C. or on marijuana, mother chose marijuana.

Mother admitted to heavy marijuana use for the prior three or four years. Her use was so heavy that even though she claimed not to have smoked in her motel room after R.C. was born, the air quality in the room from marijuana and cigarette smoke was still so poor two weeks after R.C.'s birth that the social worker found it difficult to breath and unhealthy for R.C.

Moreover, despite prior dependency cases in which mother and father lost custody of or parental rights to a child due to marijuana abuse and despite their claimed willingness to stop smoking marijuana altogether if necessary, mother and father continued to smoke marijuana daily after R.C. was born and throughout R.C.'s dependency case and expressed reluctance to discontinue their marijuana use. Mother said she would not smoke marijuana until R.C. was asleep and that she would

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abuse and current abuse of marijuana. In 2011, the juvenile court also terminated reunification services to father's child Z.T. in a case that concerned father's domestic violence.



smoke it outside. Father said that he and mother would take turns smoking marijuana.

At the October 10, 2017, child and family team meeting, mother expressed her desire to reunify with R.C. and her willingness to do whatever was necessary to reunify with R.C. At the October 18, 2017, detention hearing, the juvenile court ordered visitation for mother with R.C. who was placed with mother's relative. At the April 14, 2018, jurisdiction/disposition hearing, however, mother testified she had visited R.C. a total of three times in the seven months since R.C. was detained.

Finally, the juvenile court's substantial risk analysis was misguided. In dismissing the petition, the juvenile court stated, "[T]he court is going to dismiss the entire petition because I believe that the [D]epartment has fundamentally failed to present the type of evidence this court needs to make a determination that the levels of consumption of marijuana by both mother and father reaches to a point not only of intoxication, [but] that the intoxication then presents a current and ongoing risk to the minor child." However, "nothing in the statutes suggests a legislative intent to *require* a court to consult scientific authority or empirical evidence before it makes the 'substantial risk' determination. The specific factors the Legislature stated in section 300, subdivision (j) do not include such evidence. Rather, after considering the nature and severity of the abuse and the other specified factors, the juvenile court is supposed to use its best judgment to determine whether or not the particular substantial risk exists." (*In re I.J.*, *supra*, 56 Cal.4th at pp. 778-779.)

Because the evidence compels a finding of jurisdiction under subdivision (j) as a matter of law—that is, that there is a

substantial risk that R.C. will be neglected due to mother's marijuana use—the juvenile court erred in dismissing the subdivision (j) count.

#### **IV. DISPOSITION**

The order is reversed and the matter is remanded with directions to assume jurisdiction over R.C. under section 300, subdivision (j) and thereafter hold a disposition hearing and proceed as required by law.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.